Human Rights Regulations
Frequently Asked Questions #3
02/01/02

Section of Regulations	Clarification Requested	Clarification Provided
Assurance of rights 40, B, 2	**Section of the regulation in question:** **12 VAC 35-115-40. Assurance of rights.** **A. These regulations protect the rights established in § 37.1-84.1 of the Code of Virginia.** **B. Individuals are entitled to know what their rights are under these regulations; therefore, providers shall take the following actions:** **1. Display, in areas most likely to be noticed, a document listing the rights of individuals under these regulations and how individuals can contact a human rights advocate.** **2. Notify each individual and his authorized representative, as applicable, about these rights and how to file a complaint. The notice shall be in writing and in any other form most easily understood by the individual. The notice shall tell an individual how he can contact the human rights advocate and give a short description of the human rights advocate's role. The provider shall give this notice at the time an individual begins services and every year thereafter.** Clarification requested: After an individual signs the notice of rights how long is it good for?	One year

Dignity **50, C,7, 8**	**Section of the regulation in question:** **12 VAC 35-115-50. Dignity.** **A. In services provided in residential settings, each individual has the right to:** **7. Communicate privately with any person by mail or telephone…** **8. Have or refuse visitors.** Clarification requested: Is it permissible to limit an individual's access to the phone if they are placing inappropriate calls to 911? In an emergency situation such as an ER, must the individual have access to the phone?	The regulations provide several ways to address the situation of phone calls. Sections of the regulations that could apply are below: **12 VAC 35-115-50. Dignity.** **E. Exceptions and conditions to the provider's duties.** **4. Providers may limit the use of a telephone in the following ways:** **a. Providers may limit use to certain times and places to make sure that other individuals have equal access to the telephone and that they can eat, sleep, or participate in an activity without being disturbed.** **b. Providers may limit use by individuals receiving services for substance abuse, but only if sound therapeutic practice requires the restriction and the human rights advocate is notified.** **c. Providers may limit an individual's access to the telephone if communication with another person or persons will result in demonstrable harm to the individual and is significantly impacting treatment in the judgment of a licensed physician or doctoral level psychologist. The reasons for the restriction shall be documented in the individual's service record and the human rights advocate shall be notified prior to implementation.** Providers must attempt restrictions that are the least restrictive alternative. For example, the provider might supervise the dialing of telephone numbers by the individual who inappropriately phones 911. If this does not work then the provider must document that "harm" will come without such a restriction. The same would hold true for the emergency situation. It would have to be documented that harm would be come to the individual if the access to phones were not restricted. The advocate must be notified of such restrictions per the above section in the regulations. **6. Providers may stop, report or intervene to prevent any criminal act.**

Dignity **50, E, 3,4, 5**	**Section of the regulation in question:** **. 12 VAC 35-115-50. Dignity.** **E. Exceptions and conditions to the provider's duties.** **3. If a provider has reasonable cause to believe that an individual's mail contains illegal material or anything dangerous, the director may open the mail, but not read it, in the presence of the individual. The director shall inform the individual of the reasons for the concern. An individual's ability to communicate by mail may also be limited if, in the judgment of a licensed physician or doctoral level psychologist (in the exercise of sound therapeutic practice), the individual's communication with another person or persons will result in demonstrable harm to the individual's mental health. The reasons for the restriction shall be documented in the individual's service record, the human rights advocate shall be notified prior to implementation.** **4. Providers may limit the use of a telephone in the following ways:** **a. Providers may limit use to certain times and places to make sure that other individuals have equal access to the telephone and that they can eat, sleep, or participate in an activity without being disturbed.** **b. Providers may limit use by individuals receiving services for substance abuse, but only if sound therapeutic practice requires the restriction and the human rights advocate is notified.** **c. Providers may limit an individual's access to the telephone if communication with another person or persons will result in demonstrable harm to the individual and is significantly impacting treatment in the judgment of a licensed physician or doctoral level psychologist. The reasons for the restriction shall be documented in the individual's service record and the human rights advocate shall be notified prior to implementation.** **5. Providers may limit or supervise an individual's visitors when, in the judgment of a licensed physician or doctoral level psychologist, the visits result in demonstrable harm to the individual and significantly impact the individual's treatment; or when the visitors are suspected of bringing contraband or in any other way are threatening harm to the individual. The reasons for the restriction shall be documented in the individual's service record, and the human rights advocate shall be notified prior to implementation.**	A licensed psychologist or physician must determine if access to telephones, visitors or mail would result in demonstrable harm to the individual or if they would be giving demonstrable harm to someone else.

Participation in Decision Making **70**	**Section of the regulation in question:** 12 **VAC 35-115-70. Participation in decision making.** **A. Each individual has a right to participate meaningfully in decisions regarding all aspects of services affecting him. This includes the right to:** **1. Participate meaningfully in the preparation, implementation and any changes to the individual's services and discharge plans.** **2. Express his preferences and have them incorporated into the services and discharge plans consistent with his condition and need for services and the provider's ability to provide.** **3. Object to any part of a proposed services or discharge plan.** **4. Give or not give consent for treatment, including medical treatment. See Consent 12 VAC 35-115-30.** **5. Give or not give written informed consent for electroconvulsive treatment prior to the treatments or series of treatments.** Clarification requested: If an individual voluntarily consents to receive services from a provider and the program has certain restrictions such as on phone, mail or visitors, is such consent sufficient to limit certain rights.	Providers cannot violate the regulations even with consent from the individual or LAR. Any restriction applied must be done in accordance with the regulations. See the following sections for more information: **Dignity** **Participation in Decision Making** **Restrictions on freedoms of everyday life.** **Variances**

Participation in Decision Making 70	**Section of the regulation in question:** 12 **VAC 35-115-70. Participation in decision making.** **A. Each individual has a right to participate meaningfully in decisions regarding all aspects of services affecting him. This includes the right to:** **1. Participate meaningfully in the preparation, implementation and any changes to the individual's services and discharge plans.** **2. Express his preferences and have them incorporated into the services and discharge plans consistent with his condition and need for services and the provider's ability to provide.** **3. Object to any part of a proposed services or discharge plan.** **4. Give or not give consent for treatment, including medical treatment. See Consent 12 VAC 35-115-30.** **5. Give or not give written informed consent for electroconvulsive treatment prior to the treatments or series of treatments.** Clarification requested: Must all the steps of informed consent be documented? Must informed consent be in writing? Must you get informed consent for each medication that presents a risk of harm to the individual or can informed consent be obtained for medications in general. How long is the informed consent good for?	Informed consent must be documented and all steps completed. The documentation can be a note in the file. Each step does not however need to be documented. Written consent is required for the disclosure of confidential information **(12 VAC 35-115-80, Confidentiality B, 4).** Best practice would be to obtain a signature for all informed consent. Informed consent for ECT has additional requirements. See the ECT check list on the web page. Providers must obtain informed consent for each treatment, procedure or medication that presents a risk of harm greater than that ordinarily encountered in daily life. Informed consent is good for the length of the treatment or until the individual withdraws the consent. ♦ **See the definition of Consent.** ♦ **See FAQ #1 and #2 for more information on ECT and informed consent.**

Participation in Decision Making 70A, 5	**Section of the regulation in question:** 12 **VAC 35-115-70. Participation in decision making.** **A. Each individual has a right to participate meaningfully in decisions regarding all aspects of services affecting him. This includes the right to:** **5. Give or not give written informed consent for electroconvulsive treatment prior to the treatments or series of treatments.** **a. Informed consent shall be documented on a form that shall become part of the individual's services record. In addition to containing the elements of informed consent as set forth in the definition of "consent" in 12 VAC 35-115-30, this form shall:** **(1) Specify the maximum number of treatments to be administered during the series;** **(2) Indicate that the individual has been given the opportunity to view an instructional video presentation about the treatment procedures and their potential side effects;** **(3) Be signed by the individual receiving the treatment, or the individual's legally authorized representative, where applicable; and** **(4) Be witnessed in writing by a person not involved in the individual's treatment who attests that the individual has been counseled and informed about the treatment procedures and the potential side effects of the procedures.** Clarification requested: What does "not involved in the individual's treatment" mean in the above section? Could it be a tech or a nurse? Does this apply to outpatient ECT?	It could be any person who has the ability to verify that the provider went through each step of informed consent for ECT with the individual receiving services or the LAR so long as that person is not involved in the treatment of the individual. These regulations apply to providers who are licensed, funded or operated by DMHMRSAS. If the person writing the order for the ECT is an employee of a service licensed by the DMHMRSAS or if the ECT is being administered in a service licensed by DMHMRSAS then the regulations apply.

Participation in Decision Making 70	**Section of the regulation in question:** **12 VAC 35-115-70. Participation in decision making.** **B. The provider's duties.** **9. When it is determined that an individual lacks the capacity to give consent, the provider shall designate a legally authorized representative. The director shall have the primary responsibility for determining the availability of and designating a legally authorized representative in the following order of priority:** **a. An attorney-in-fact currently authorized to give consent under the terms of a durable power of attorney, a health care agent appointed by an individual under an advance directive pursuant to § 54.1-2983 of the Code of Virginia, a legal guardian of the individual not employed by the provider and currently authorized to give consent, or, if the individual is a minor, a parent having legal custody of the individual.** **b. The individual's next of kin. In designating the next of kin, the director shall select the best qualified person, if available, according to the following order of priority unless, from all information available to the director, another person in a lower priority is clearly better qualified: spouse, an adult child, a parent, an adult brother or sister, any other relative of the individual. If the individual expresses a preference for one family member over another in the same category, the director shall appoint that family member.** **c. If no other person specified in subdivisions a and b is available and willing to serve, a provider may appoint a next friend of the individual, after a review and finding by the LHRC that the proposed next friend has shared a residence with or provided support and assistance to the individual for a period of at least six months prior to the designation, the proposed next friend has appeared before the LHRC and agreed to accept these responsibilities, and the individual has no objection to this proposed next friend being appointed authorized representative.** Clarification requested: What if the brother of the individual has not seen him/her in 20 years? Must they be appointed AR? Do you need to go through a legal process to get an LAR.	The provider may select someone to be an LAR from a lower category if that person is clearly better qualified to serve as LAR. The provider may appoint a LAR according to the steps outlined in the regulations without utilizing a court process. These steps are consistent with the Health Care Decisions Act **(§ 54.1-2481 et seq.).** A LAR does not have to be in the same location as the individual receiving services. They can provide consent via phone, fax, email etc. ♦ **See FAQ #1 for more information on this topic.**

Participation in Decision Making 70	**Section of the regulation in question:** **12 VAC 35-115-70. Participation in decision making.** **B. The provider's duties.** **7. If the capacity of an individual to give consent is in doubt, the provider shall make sure that a professional qualified by expertise, training, education, or credentials and not directly involved with the individual conducts an evaluation and makes a determination of the individual's capacity.** Clarification requested: Who makes a capacity determination? Who pays for a capacity determination? If someone has been admitted on a TDO or involuntarily does that mean they lack capacity? How is this different from legally incapacitated? What if an individual is readmitted after a short time. Do you need to do another capacity determination? What if finding an LAR takes too long and delays treatment?	The regulations indicate that a professional who is qualified by expertise, training, education or credentials and who is NOT directly involved with the individual conducts an evaluation and makes the capacity determination. The provider has the responsibility to have this evaluation done if there is a question about the individual's ability to give consent to treatment (capacity). This evaluation would need to be completed for each admission when there is a doubt about the individual's ability to give consent. When an individual is admitted under an involuntary status or TDO that does not mean that the individual lacks capacity to make treatment decisions. The capacity determination is a separate process from the nature of the admission to service. Legal incapacitation is a designation made by a court pursuant to § 37.1-134.6 of the Code of Virginia. A court order always supersedes the regulations and can only be overturned by another court of competent jurisdiction. Providers can provide treatment in an emergency and by court order as indicated in **12 VAC 35-115-70, C Participation in decision making.** **C. Exceptions and conditions to the provider's duties.** **1. Providers, in an emergency, may initiate, administer, or undertake a proposed treatment without the consent of the individual or the individual's legally authorized representative. All emergency treatment shall be documented in the individual's services record within 24 hours.** **a. Providers shall immediately notify the legally authorized representative, as applicable, of the provision of treatment without consent during an emergency.**

Confidentiality 80, B	**Section of the regulation in question:** **12 VAC 35-115-80. Confidentiality.** **B. Exceptions and conditions to the provider's duties.** **2. Providers may disclose the following information without consent or violation of the individual's confidentiality, but only under the conditions specified in this subdivision and in subdivision 3 of this subsection. Providers should always consult 42 CFR Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records, if applicable, because these federal regulations may prohibit some of the disclosures addressed in this section. See also § 32.1-127.1:03 of the Code of Virginia for a list of circumstances under which records may be disclosed without consent.** **c. Insurance companies and other third party payers: Disclosure may be made to insurance companies and other third party payers according to Chapter 12 (§ 37.1-225 et seq.) of Title 37.1 of the Code of Virginia.** d. **Court proceedings: If the individual, or someone acting for him, introduces any aspect of his mental condition or services as an issue before a court, administrative agency, or medical malpractice review panel, the provider may disclose any information relevant to that issue. The provider may also disclose any records if they are properly subpoenaed, if a court orders them to be produced, or if involuntary commitment or certification is being proposed or conducted.** **e. Legal counsel: Providers may disclose information to their own legal counsel, or to anyone working on behalf of their legal counsel, in providing representation to the provider. Providers of state-operated services may disclose information to the Office of the Attorney General, or to anyone working on behalf of that office, in providing representation to the Commonwealth of Virginia.** **h. Preadmission screening, services and discharge planning: Providers may disclose to the department, the CSB or to other providers information necessary to prescreen individuals or to prepare and carry out a comprehensive individualized services or discharge plan (see § 37.1-98.2 of the Code of Virginia).** Clarification requested: What if an individual does not want there information released to the insurance company? Can a private facility release information to a CSB or BHA without consent? Can an individual's attorney have access to their	If the individual tells you not to release the information to an insurance company then you do not have to release the information unless you have "deemed consent" pursuant to § 37.1-226 of the Code of Virginia. Only if and when the Code of Virginia allows the release. Check § 32.1-127:01 of the Code of Virginia for specific exceptions that may apply to your entity. With consent, confidential information may be released to anyone including the individual's attorney. Providers may release information to an attorney without consent for court proceedings or in response to a subpoena in specific circumstances. Check § 8.01-413 of the Code of Virginia for more information.

Parti**cipation in Decision Making 70, A**	**Section of the regulation in question:** 12 **VAC 35-115-70. Participation in decision making.** **A. Each individual has a right to participate meaningfully in decisions regarding all aspects of services affecting him. This includes the right to:** **1. Participate meaningfully in the preparation, implementation and any changes to the individual's services and discharge plans.** **2. Express his preferences and have them incorporated into the services and discharge plans consistent with his condition and need for services and the provider's ability to provide.** **3. Object to any part of a proposed services or discharge plan.** **4. Give or not give consent for treatment, including medical treatment. See Consent 12 VAC 35-115-30.** **5. Give or not give written informed consent for electroconvulsive treatment prior to the treatments or series of treatments.** Clarification requested: If an individual is a minor, can he/she refuse to give consent? Do minors have a voice?	The parent of a minor is like a guardian for an adult. If the minor feels his/her rights have been violated he/she can file a complaint per **12 VAC 115-140. Complaint and fair hearing** and subsequent sections. Minors do have certain decision-making rights under § 54.1-2969 of the Code of Virginia. ♦ **See also 12 VAC 35-115-200. Special procedures for LHRC reviews involving consent.** ♦ **See 12 VAC 35-115-70. Participation in decision making, B, 5.** ♦ **See also FAQ #2 for more information regarding minors.**

Restrictions on freedoms of Everyday life 110 C, 4	**Section of the regulation in question:** **12 VAC 35-115-100. Restrictions on freedoms of everyday life. C. Exceptions and conditions on the provider's duties.** **4. Providers shall, in the development of these rules of conduct:** **a. Get as many suggestions as possible from all individuals who are expected to obey the rules.** **b. Apply these rules in the same way to each individual.** **c. Give the rules to and review them with each individual and his legally authorized representative in a way that the individual can understand them. This includes explaining possible consequences for violating the rules.** **d. Post the rules in summary form in all areas to which individuals and their families have regular access.** **e. Submit the rules to the LHRC for review and approval before putting them into effect, before any changes are made to the rules, and upon request of the advocate or LHRC.** **f. Prohibit individuals from disciplining other individuals, except as part of an organized self-government program conducted according to a written policy approved in advance by the LHRC.** Clarification requested: If the LHRC does not approve Rules of Conduct is there an appeal process?	The regulations do not provide for an appeal of the LHRCs decision regarding Rules of Conduct. If Rules of Conduct are not approved by a LHRC the provider should request clarification and guidance from the LHRC. The provider can also pursue a variance according to 12 VAC 35-115-220, Variances.

Dignity **50, C, E**	**Section of the regulation in question:** **. 12 VAC 35-115-50. Dignity.** **C. In services provided in residential settings, each individual has the right to:** **7. Communicate privately with any person by mail or telephone…** **8. Have or refuse visitors.** **E. Exceptions and conditions to the provider's duties.** **1. If an individual has funds for clothing and to buy paper, pencils, and stamps to send a letter every day, the provider does not have to pay for them.** **2. The provider may prohibit any religious services or practices that present a danger of bodily injury to any individual or interfere with another individual's religious beliefs or practices. Participation in religious services or practices may be reasonably limited by the provider in accordance with other general rules limiting privileges or times or places of activities.** **3. If a provider has reasonable cause to believe that an individual's mail contains illegal material or anything dangerous, the director may open the mail, but not read it, in the presence of the individual. The director shall inform the individual of the reasons for the concern. An individual's ability to communicate by mail may also be limited if, in the judgment of a licensed physician or doctoral level psychologist (in the exercise of sound therapeutic practice), the individual's communication with another person or persons will result in demonstrable harm to the individual's mental health. The reasons for the restriction shall be documented in the individual's service record, the human rights advocate shall be notified prior to implementation.** **4. Providers may limit the use of a telephone in the following ways:** **a. Providers may limit use to certain times and places to make sure that other individuals have equal access to the telephone and that they can eat, sleep, or participate in an activity without being disturbed.** **b. Providers may limit use by individuals receiving services for substance abuse, but only if sound therapeutic practice requires the restriction and the human rights advocate is notified.**	The regulations provide for restrictions of an individual's rights under certain circumstances. A blanket restriction of rights for **all** individuals or a **group** of individuals will require a variance. Please note that if an individual's rights to visits, phone or mail are limited under this section that the human rights advocate must be notified prior to implementation of the restriction. ♦ **See also FAQ #2 for more information on restrictions of phone, visits and mail.** ♦ **See also 12 VAC 35-115-220. Variances.**

Assurance of Rights **A, 1, 6**	**Section of the regulation in question:** **12 VAC 35-115-40. Assurance of rights.** **A. These regulations protect the rights established in § 37.1-84.1 of the Code of Virginia.** **B. Individuals are entitled to know what their rights are under these regulations; therefore, providers shall take the following actions:** **1. Display, in areas most likely to be noticed, a document listing the rights of individuals under these regulations and how individuals can contact a human rights advocate.** **6. Display and provide written notice of rights in the most frequently used languages.** Clarification requested: What does "most frequently used languages" mean? Where should the notice of rights be displayed?	Providers will need to make a decision about what the " most frequently use languages" means for their particular service. The Department has provided samples of the notice of rights in various languages. on the Office of Human Rights web page. The notice should be posted where it is most likely to be seen by individuals receiving services. A provider can always ask for recommendations of potential locations from the human rights advocate or DMHMRSAS licensing specialist that serves its particular program.

Confidentiality 80, C	**Section of the regulation in question:** **12 VAC 35-115-80. Confidentiality.** **C. Exceptions and conditions to the provider's duties.** **3. If information is disclosed without consent to anyone other than employees of the department, CSB or other provider, providers shall take the following steps before the disclosure (or, in an emergency, promptly afterward):** **a. Put a written notation of the information disclosed, the name of the person who received the information, the purpose of disclosure, and the date of disclosure permanently in the individual's services record.** **b. Give the individual or his legally authorized representative written notice of the disclosure, including the name of each person who received the information and the nature of the information.** Clarification requested: Does written notice need to be provided each time?	Yes, however the notification can be sent after the information has been sent per this section of the regulations.

Confidentiality 80, C, 3	**Section of the regulation in question:** **12 VAC 35-115-80. Confidentiality.** **C. Exceptions and conditions to the provider's duties.** **3. If information is disclosed without consent to anyone other than employees of the department, CSB or other provider, providers shall take the following steps before the disclosure (or, in an emergency, promptly afterward):** **a. Put a written notation of the information disclosed, the name of the person who received the information, the purpose of disclosure, and the date of disclosure permanently in the individual's services record.** **b. Give the individual or his legally authorized representative written notice of the disclosure, including the name of each person who received the information and the nature of the information.** Clarification requested: Does this section mean that a provider must obtain consent before sending information to another medical professional or specialist? If consent must be obtained before sending an individual to a specialist, would verbal consent for treatment and disclosure of information that is documented and witnessed by two parties be considered adequate?	Section C, 3 refers to providers. The regulations define "provider" as the following: **"Provider" means any person, entity, or organization offering services that is licensed, funded, or operated by the department.** The individual or the LAR must give consent for all treatment per 12 VAC 35-115-70. Therefore, you must obtain consent prior to sending an individual to any service provider for treatment. Verbal consent is adequate in most situations, but be mindful of the requirements for informed consent per 12 VAC 23-115-30. Informed consent must be obtained for the disclosure of confidential information. Therefore, you would need to obtain informed consent prior to sending the information to the medical specialist unless there is an exemption to the consent requirements per **12 VAC 35-115-80. Confidentiality C.** Verbal consent for treatment and informed consent for disclosure of information would be required. If confidential information is disclosed without consent then the procedures in C, 3 would need to be followed. **12 VAC 35-115-70. Participation in decision making.** **A. Each individual has a right to participate meaningfully in decisions regarding all aspects of services affecting him. This includes the right to:** **4. Give or not give consent for treatment, including medical treatment. See Consent 12 VAC 35-115-30.** **B. The provider's duties.** **5. Providers shall obtain and document in the individual's services record the individual's consent for any treatment, including medical treatment, before the treatment begins. If the individual is a minor in the legal custody of a natural or adoptive parent, the provider shall obtain this consent from at least one parent. The consent of a parent is not needed if a court has**

Confidentiality **80, B, 6**	**Section of the regulation in question:** **12 VAC 35-115-80. Confidentiality.** **6. Upon request, providers shall tell individuals the sources of information contained in their services records and the names of anyone, other than employees of the provider, who has received information about them from the provider. Individuals receiving services should be informed that the department may have access to their records.** Clarification requested: Does this section mean that staff must document all verbal disclosures that are made to treatment providers, family members, relatives, or friends and billing inquiries.	The names of anyone who received an individual's confidential information must be made available to that individual upon request. Therefore, providers should document such disclosures.

Parti**cipation in Decision Making 70,**	**<u>Section of the regulation in question:</u>** **B. The provider's duties.** **9. When it is determined that an individual lacks the capacity to give consent, the provider shall designate a legally authorized representative. The director shall have the primary responsibility for determining the availability of and designating a legally authorized representative in the following order of priority:** **c. If no other person specified in subdivisions a and b is available and willing to serve, a provider may appoint a next friend of the individual, after a review and finding by the LHRC that the proposed next friend has shared a residence with or provided support and assistance to the individual for a period of at least six months prior to the designation, the proposed next friend has appeared before the LHRC and agreed to accept these responsibilities, and the individual has no objection to this proposed next friend being appointed authorized representative.** <u>Clarification requested:</u> With regards to "next friend" what qualifies as "support and assistance"? Could it be regular assistance with grocery shopping and community recreation or does it need to be more involved than that? Is it up to the LHRC do decide when the proposed next friend appears before them?	The LHRC will determine what qualifies as "support and assistance".

General Question	**Section of the regulation in question:** Clarification requested: Is the Health Care Decision Act the same as Court Ordered Treatment?	Court Ordered Treatment requires that specific steps be completed according to the judicial authorization statute, § 37.1-134.21 of the Code of Virginia. This is different from the HCDA procedure for appointing a substitute decision-maker.